Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1995

Mr. Ronald H. Clark
Wolfe, Clark, Henderson & Tidwell, L.L.P.
123 North Crockett Street, suite 100
Sherman, Texas 75090

OR95-494

Dear Mr. Clark:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32819.

The Sherman Independent School District (the "district") received an open records request asking that the district provide the requestor with "copies of the sixteen letters that I have alleging [sic] written to you and the U.I.L. per Mr. Outlaw's meeting and remarks on or about the 23rd of March, 1995." You state that you are interpreting the requestor's letter as asking for copies of sixteen letters which he *allegedly* wrote to the U.I.L. and to the district.[1] You have enclosed for our review sixteen anonymous letters sent to the district's superintendent. You initially contend that the letters requested are excepted from disclosure because they are not public records as defined by section 552.002 of the Government Code. Alternatively, you contend that the letters are excepted from disclosure under sections 552.101, 552.102, 552.026, and 552.305 of the Government Code.

Section 552.002 of the Government Code provides that a "public record" means that portion of a document, writing, letter, memorandum or other written, printed, typed, copied, or developed material that contains public information. Section 552.021 of the Government Code provides that information is public if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or *maintained* by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it. You contend that the letters are

[1]We note that if the requestor has copies of the letters at issue, then there would be no basis to withhold them. Open Records Decision No. 436 (1986).

not public records because they were not "written, collected, or prepared by a governmental body." Since the district, a governmental body, collected and maintains the sixteen letters at issue, they are public records within the statutory definition.

You contend that section 552.101 of the Government Code excepts the anonymous letters from disclosure because each of the district employees mentioned in the letters "could be held up to public ridicule and disgrace based upon the groundless anonymous letters for which there is no supporting evidence." You assert that "the individuals named in the letters would suffer severe interference with their privacy interests." You also contend that pursuant to section 552.102, the district may withhold the sixteen letters because the letters would be part of the personnel files of the district employees involved. You argue that no reasonable person would want unsubstantiated reports alleging embarrassing, offensive, and unprofessional conduct disclosed about them.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that:

> information ... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S. predecessor to section 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts:

> (a) ... information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

> (b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled test applied in decision under former § 3(a)(2), V.T.C.S. art. 6252-17a, was same delineated in *Industrial Foundation* for former § 3(a)(1), V.T.C.S. art. 6252-17a). Accordingly, we consider the arguments for withholding information from required public disclosure under the common-law privacy aspects of section 552.101 and section 552.102 together.

We have reviewed the documents and have found no information that could be considered highly intimate and embarrassing based upon the standards set forth for common-law privacy.

You also contend that the requested information is excepted under the constitutional right to privacy. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education and are clearly inapplicable here.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The records at issue do not concern the "most intimate aspects of human affairs." You may not withhold any of the records under the constitutional right to privacy.

Additionally, the district asserts that because the information comes from an anonymous source that it is presumptively false and in the false light category. False light privacy is no longer an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W2d 577, 570 (Tex. 1994). Thus, the truth or falsity of the information is irrelevant under the Open Records Act.

The district also contends that because many of the letters contain references to specific students, that pursuant to section 552.026 and the Family Educational Rights and Privacy Act ("FERPA"), such information should be withheld from required disclosure.

Section 552.026 and section 552.114 incorporate the requirements of FERPA into the Open Records Act. Open Records Decision No. 431 (1985). FERPA provides in relevant part the following:

> (a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .
>
> (b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g. "Education records" are records that

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 539 (1990), 462 (1987) at 14-15, 447 (1986).[2] Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). Section 552.026, in conjunction with FERPA, may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a student" or one or both of the student's parents. *See id.*; Open Records Decision No. 206 (1978). Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure.

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[2]The phrase "student record" in section 552.114 has generally been construed to be the equivalent of "education records." Thus, our resolution of the availability of this information under FERPA in this instance also resolves the applicability of section 552.114 to the requested information. *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990), 477 (1987), 332 (1982).

Additionally, we note that FERPA and therefore sections 552.114 apply to students who formerly attended an educational institution as well as those presently in attendance. *See* Open Records Decision No. 524 (1989).

Some of the submitted letters contain information that identifies or tends to identify current and former students. We have marked portions of the information tending to identify students which may be released only in accordance with FERPA. You must withhold the type of marked information from required disclosure pursuant to FERPA and section 552.114.

We note that some of the information may fall within the definition of "directory information." The general prohibition against release of student information does not apply to directory information. Directory information may be released under FERPA after compliance with notice requirements that afford affected students the right to object to the release of directory information relating to them. 20 U.S.C. § 1232g(a)(5)(B); *see also* Open Records Decision Nos. 244 (1980), 242 (1980), 229 (1979). Directory information includes, but is not limited to the following:

> the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232(g)(a)(5)(A). We have marked the type of information considered to be directory information. You must release this information after compliance with the FERPA notice requirements if the district receives no objections to its release. *See* Open Records Decision No. 244 (1980) at 2. Additionally, as some of the students mentioned in the letters may now be former students, we note that the district may disclose directory-type information about former students without the required notice that must be given to current students. *See* 34 CFR § 99.37(b).

You state that "the information in these letters obviously implicates the privacy interests of third parties, namely the employees named in the letters." You state that pursuant to section 552.305 of the Government Code, you sent a copy of the request together with your letter requesting an open records decision to the employees named in the letters so that they may submit reasons to this office why the information should be withheld." As we have already noted, we find no privacy interests affected by the letters submitted to us. Additionally, we note that we have received no letters from the district employees named in the letters.

In conclusion, you must release the letters at issue redacting portions of information according to our representative markings that refer to current and former students and which is not directory information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/LRD/rho

Ref: ID# 32819

Enclosures: Marked documents

cc: Mr. Kent Deligans
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(w/o enclosures)